No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

FLORENCE DOLAN, Petitioner,
v.
CITY OF TIGARD, OREGON, Respondent.

On Writ of Certiorari to the
Oregon Supreme Court

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NAIOP-THE ASSOCIATION FOR COMMERCIAL REAL ESTATE, NATIONAL REALTY COMMITTEE, NATIONAL MULTI HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION, AND AMERICAN SENIORS HOUSING ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Home Builders (NAHB) represents 165,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and

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[1] The Petitioner and Respondent have provided their written consent to file this brief and their letters of consent have been filed with the Clerk of the Court.

supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers, remodelers and manufacturers and professionals that service the building industry. NAHB is the voice of the American shelter industry.

The International Council of Shopping Centers (ICSC) is the trade association of the shopping center industry. It has approximately 24,000 members worldwide and approximately 22,000 in the United States. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

NAIOP - The Association For Commercial Real Estate is a professional organization of 5,000 individuals engaged in owning, managing and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers but also architects, brokers, master planners, engineers, property managers, banks, insurance companies and other real estate financial groups.

The National Realty Committee represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The National Multi Housing Council (NMHC) represents 500 of the larger and most respected multifamily rental housing firms. Its members are engaged in all aspects of the development

and operation of rental housing, including the ownership, building, financing, management and conversion to condominiums of such properties. The National Apartment Association (NAA) is an organization of local and state associations representing owners, builders, investors, developers and managers of multifamily properties. The NAA represents the interests of more than 200,000 multifamily housing professionals and the members of the NMHC and NAA together own and manage a substantial number of the nation's approximately 24 million rental housing units. The American Seniors Housing Association (ASHA) is affiliated with the NMHC and represents 200 of the larger and most respected seniors housing providers. Its members are involved in all aspects of the development and operation of multifamily housing for the elderly, including the ownership, building, financing and management of such properties.

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is, therefore, of paramount importance to these amici, all non-profit trade associations, and our members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all, or substantially all, economically beneficial use of their property in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental imposition is presented in this case by the city's demand that an individual private property owner dedicate her land for a public bike path and greenway system along a river merely because the landowner wishes to lawfully expand her small electrical and plumbing supply business.

That a bike path and greenway system along a river are legitimate and worthwhile public desires is not the question. The question of interest to these amici is whether the land for these

public amenities must be contributed by individual private property owners, without payment therefor, who happen to own and wish to improve real estate lots that are within the government's chosen path for such facilities.

The NAHB has been before this Court either as an amicus curiae in support of or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). The NAHB and ICSC joined to file an amici curiae brief in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). The NAHB's brief was favorably cited in this Court's Nollan opinion, 483 U.S. at 840, the opinion that is at the heart of the present controversy.

This brief is submitted to show the dire need to clarify for legislatures, land use regulatory agencies and the lower courts that in order to avoid a taking of private property, the federal Constitution requires a direct, essential and substantial nexus between public burdens created by land use proposals and government imposed permit exactions or conditions.

These amici sincerely believe that this brief will assist the Court in building on its prior decision in Nollan, 483 U.S. 825. On a daily basis our members across the nation are faced with countless regulatory decisions that affect the use of privately held land. The vast majority of these decisions come from local governments and some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the City of Tigard

inflicts on her concerns, our brief cites authorities different from those in petitioner's brief, proposes a strong rational relationship nexus and also addresses the broader public policy concerns that require a more substantial nexus test for land use regulatory agencies.

SUMMARY OF THE ARGUMENT

This Court has repeatedly stated that a governmental action violates the takings clause of the Fifth Amendment if the action does not substantially advance legitimate government interests. The leading application of this prong of takings doctrine appears in Nollan v. California Coastal Commission, 483 U.S. 825 (1987). This rule is essential to guard against governmental acts that would impose on individuals costs that properly belong with the public as a whole even if the individual has not been denied all, or substantially all, economically viable use of its property.

The City of Tigard's land dedication exaction does not substantially advance, in the constitutional sense, its legitimate government interest in a public bike path and greenway system along a river. The city justifies its land exaction through a purported but unsupported nexus between an otherwise lawful land use proposal and the city's professed need for a bike path and greenway system. The city's justification is based on mere assumptions and findings of general facts as to the burdens created by the proposed use of land and, more to the point, how the development exactions are connected to or would alleviate those burdens. While clever and imaginative, the justification is far too tenuous to pass constitutional scrutiny. If it is allowed to stand, governments at all levels will feel ever more free to contrive any nexus, no matter how flimsy, between an individual's proposed use of his or her land and the furtherance of a legitimate public purpose. Nollan's requirement for a direct, essential nexus, Id., 483 U.S. at 837, will vanish.

Additionally, while the decision below follows a few similar interpretations of both the extent of Nollan's required nexus and the level of judicial scrutiny to be applied in reviewing such nexus, it is directly contrary to most other courts and the greater weight of published authority. These latter authorities interpret Nollan as requiring a nexus greater than a mere minimal rational relationship and heightened judicial scrutiny of government's claimed nexus. This Court must reapply and clarify its mandate in Nollan and restate to legislatures, land use regulatory agencies and lower courts that there must be a direct and substantial nexus between the public burdens created by a land use proposal, if any, and the approval conditions imposed on the individual property owner. But, given the wide interpretation of the adjective "substantial," the Court is urged to define the required nexus in terms understood in the context of land use exaction jurisprudence, such as "proportionality" and "specifically attributable" to public burdens created.

There is something nefarious in the city's position that a merely professed nexus is sufficient to deprive individuals of their private property with no compensation merely because the private owner wants to use her land in an otherwise lawful way. Something more substantial is required by the Constitution's just compensation clause. Planning for and acquiring the necessary land and capital to build adequate public facilities to support our cities and towns, such as alternative bike and pedestrian pathways and river greenways, are important governmental functions in maintaining society's quality of life. But propositions that further those ends must respect the property rights of individuals. Anything short of that proper respect, as has occurred here, is repugnant to the higher considerations expressed in the Constitution and cannot stand. The constitutional rights at issue in this case, which were not upheld below, must be reconfirmed by this Court. Those suffering under the deplorable state of affairs of the land use regulatory system across the country are desperate, if not greatly anxious, for further United States Supreme Court supervision of their constitutional rights.

These amici respectfully request the Court to reverse the decision below and restate the nexus appropriately required by the Constitution's takings clause in these situations. Further, we urge the Court to restate that courts should employ a heightened level of scrutiny to the nexus claims of government's land use regulators. It is our fervent hope that the Court will send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

ARGUMENT

I. THIS COURT SHOULD NOT ALLOW THE SUBSTANTIAL ADVANCEMENT PRONG OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE, WHICH OSTENSIBLY PROHIBITS THE TYPE OF PERMIT CONDITION EXACTED IN THIS CASE, TO BECOME USELESS TO PROPERTY OWNERS AS A LIMITATION ON GOVERNMENT POWER

This Court has reiterated that a regulatory taking occurs if a government regulation either denies a property owner economically beneficial use of the property or does not substantially advance a legitimate government interest. Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two prongs of takings doctrine is self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all, or substantially all, economically beneficial use of

the private property.[2] Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner economically beneficial use of the property but nonetheless do not substantially advance a legitimate government interest. Nollan, 483 U.S. 825; Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371 (Ct. App. 1991); see also Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992) (Petitioners allegation that an ordinance "does not 'substantially advance' a 'legitimate state interest' . . . does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property . . . ."). These two tests are an important part of this Court's effort to protect individuals in situations where it would be unfair to impose costs on an individual that properly belong with the public. See Armstrong v. United States, 364 U.S. 40, 49 (1960); Seawall Associates v. City of New York, 542 N.E.2d 1059, 1065 (1989), cert. denied, 110 S. Ct. 500 (1989).

The substantial advancement takings test, as applied to land use permit exactions, requires that there be an "essential nexus" between a permit condition and the burden placed on the community by the proposed land use. See Nollan, 483 U.S. at 837. Further, the government's support for this essential nexus, when challenged, must be reviewed by a court with heightened scrutiny. Id., 483 U.S. at 834 n.3. The issue presented, which "involves questions of federal law," Dolan v. City of Tigard, 317 Or. 110, 122, 854 P.2d 437, 444 (1993) (Peterson, J., dissenting), is whether the city's demand that the property owner dedicate

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[2] See, e.g., Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (While upholding the Clean Water Act's grant of jurisdiction to regulate certain wetlands, the Court noted that a property owner can still bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

land for a bike path and greenway along a river bordering her property substantially advances, in the constitutional sense, the city's legitimate interest in providing such public facilities. That is, the question involves whether there is an essential nexus between the burdens on the city that are caused by Dolan and Dolan's permit condition.

It is not constitutionally sufficient for a government to profess or even prove merely that there is an impact from the proposed land use and that the permit condition furthers, in a literal sense, a legitimate government interest. If that were so, the government would always win. For example, if a municipality has a legitimate interest in maintaining an efficient highway and street system (and one would presume it does) and if a proposed land use admittedly would generate one additional car per week visiting the owner's site, would an approval condition that requires the single land use applicant to dedicate and construct a four-lane highway with an interchange at the rear of the lot be justified under the Constitution? We think not despite the fact that, in this hypothetical, there is an admitted impact and the new highway and interchange clearly furthers the municipal interest in having an efficient traffic system. The important point in both this hypothetical and in this case is that 1) whatever impacts to the public from a proposed land use are admitted or proved and 2) whatever connection a development exaction has to the furtherance of a legitimate government interest, 3) there must, in addition, be sufficient facts in the record that support a direct relationship between the public impacts caused by the proposed land use and the specific exaction involved.

While the land use impact itself and the connection between the permit condition and the government's desires for public facilities are constitutionally important elements of a sound land use regulatory analysis, most often the critical factor for landowners is the relationship (i.e., the essential nexus) between the public burdens they create and the conditions or exactions ostensibly designed to alleviate such burdens. Accord, e.g.,

Leroy Land Development v. Tahoe Regional Planning Agency, 733 F. Supp. 1399, 1401 (D. Nev. 1990) (Nollan's "fairly close nexus . . . should be considered in conjunction with the property in question."), rev'd, 939 F.2d 696 (9th Cir. 1991). Anything less than a close relationship between public impacts created by an individual and government imposed exactions runs the risk of having that individual bear costs the need for which she did not create and that properly belong with the public, or at least other individuals. Imposing more than one's fair share of public facility costs on an individual would not be very fair.

Moreover, while the legitimacy of a government interest is best left to the discretion of the political branches of government, the means to achieving such ends is properly the subject of judicial review. Thus, upon review by the courts, the analyses of the alleged land use impacts and the relationship between such public burdens and the exactions imposed on an individual will be meaningless to property owners unless a municipality is made accountable for them. This cannot be accomplished with a deferential standard of review traditionally applied in a due process context. In examining the Court's "essential nexus," Nollan, 483 U.S. at 837, the Court has stated that

> our opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, . . . not that the "State 'could rationally have decided' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original). Thus, while the traditional deferential standard of judicial review is applicable to the question of whether

government's desired end is legitimate, the means of achieving that end, which involves questions of the alleged impact of a land use proposal and the relationship between such impacts and the property exacted from an individual, requires something more. While perhaps the strictest form of scrutiny is not warranted at this stage in the evolution of American land use jurisprudence, heightened or mid-level scrutiny is made more than necessary by the state of land use regulatory practices today.

Nollan, 483 U.S. 825, apparently, was not enough for some governments and lower courts to adequately answer the nexus question before the Court in a way that does justice to the Constitution and those wishing to live under its protection. The question presented involves an essential constitutional limitation on the burgeoning growth of land use regulations. A restatement of the law surrounding the question is now absolutely critical to the livelihood of the members of these amici as well as the pursuit of happiness by all property owners and those desiring to own property.

Here, the petitioner wishes to use her property in a way that but for the challenged permit conditions lawfully expands the current business on the site. She is penalized for this wish by the forced dedication of her land to the public. This exaction is based solely on professed and, at best, weak assumptions made by the city's regulators as to the connection between the burdens created by the expanded use and the exaction that is supposed to resolve those burdens. This cannot be the concept of fairness and justice embodied in the Fifth Amendment. Yet the Oregon Supreme Court lets the land dedication requirement stand without just compensation under the court's minimal nexus standard. Dolan, 317 Or. 110, 854 P.2d 437. We find the Oregon Supreme Court's weak nexus test and deferential rational relationship standard of review dangerous and insupportable in today's heavily regulated, yet still constitutional, society. If the court below is correct, then this Court's 1987 Nollan decision, after only a few years, has collapsed under the weight of a few lower court interpretations, and the "substantial advancement of

legitimate government interests" takings prong has become meaningless to property owners.

We do not propose that private property rights always rise to a constitutional level that thwarts all, or even most, legitimate public purpose regulations. Our society could not function if that were so, particularly since the legitimacy of regulations is given such great latitude and we live in an increasingly populated and closer world. But mere assumptions by government regulators, as here, or even findings of fact that are less than substantial are not sufficient to survive constitutional scrutiny if private property rights are to have any meaning in our constitutional culture. If the constitutional guarantee at issue here has any substance to it at all, surely the city must find substantial and concrete facts that prove on the record that there is an "essential nexus" before the city is allowed to take a portion of private property without compensation merely because the property owner wishes to conduct an otherwise lawful and proper use on it.

II. THE "ESSENTIAL NEXUS" REQUIREMENT OF NOLLAN v. CALIFORNIA COASTAL COMMISSION, 483 U.S. 825 (1987), PROHIBITS THE CITY FROM IMPOSING ITS LAND DEDICATION DESIRES ON DOLAN, AND REQUIRES REVIEW WITH HEIGHTENED JUDICIAL SCRUTINY

This case is very much like the Nollan case, where the Court admonished the government for its attempt to compel a property owner to contribute to the realization of an easement, even though the government "may well be right that [the easement] is a good idea." Id., 483 U.S. at 841. The Court stated in Nollan, 483 U.S. at 842, that if the government "wants an easement across the Nollans' property, it must pay for it." Similarly here, Tigard may well be right that providing a public

bike and pedestrian path and a river greenway system is a good idea. But, if the city wants to provide such facilities, it must pay for it.

These amici believe this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection between the government action and the burdens imposed on the community by a new use of private land. However, the Oregon Supreme Court says that it "does not read Nollan" as "abandon[ing] the 'reasonably related' test for a more stringent 'essential nexus' test." Dolan, 317 Or. at 120, 854 P.2d at 443. We recognize that the takings clause may not require that land use exactions and fees be precisely tailored to the burdens and benefits attributable to the property being assessed. See, for example, the specifically and uniquely attributable test employed by some courts to evaluate impact fees. Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). That level of nexus is the strictest form of required nexus yet devised by the courts.[3] However, the decision below essentially incorporates into its takings analysis the extremely lax, anything goes, nexus test (i.e., reasonable basis) historically used

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[3] Cf. Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981) ("[T]he Illinois Supreme Court is currently tending toward a more liberal interpretation of the validity of exaction ordinances while maintaining the requirements of proportionality and specific attributability.").

by the California state courts.[4] This is the other extreme and should not be permitted.

In looking at land use exactions, the label "rational relationship test" is typically referred to as a mid-level or intermediate analysis of the required nexus, an approach lying somewhere between a reasonable basis and one that is specifically and uniquely attributable to impacts caused and benefits received by the land owner. Crew, Development Agreements After *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 22 Urb. Law. 23, 26-27 (1990). However, it must be recognized that the so-called "intermediate" rational relationship test has multiple degrees of sophistication. Without more explicit criteria defining its requirements, merely stating that a nexus must meet the "rational relationship" label is confusing at best and dangerous at worst, as the result from the lower court's analysis points out. The Nollan "substantial advancement" standard must require something between the more deferential types of "rational relationship" standard and the strict "specific and unique" relationship standard historically utilized by a few state courts. Again, anything less than a close fit between public burdens created and private property exacted would simply not be fair, and should not be condoned by our Constitution.

In rationalizing its view of the required nexus, the Oregon Supreme Court tells us with circular logic that this Court's "essential nexus" means that an essential nexus is one that is reasonably related to an impact. Dolan, 317 Or. at 120, 854 P.2d at 443. The court below also states that this essential nexus can be found when the "exaction serves the same purpose

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[4] See Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 611-13 (Cal.), appeal dismissed, 404 U.S. 878 (1971)); See also Grupe v. California Coastal Commission, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (upholding a permit condition requiring the dedication of an easement over two-thirds of a parcel that is based on only an indirect nexus, with no benefit to the proposed single-family home).

that a denial of the permit would serve." Id. But, as in Nollan, the permit condition here cannot serve the same purpose that a development ban would achieve. The City of Tigard's purpose of acquiring a continuous and efficient bike path and greenway would not be realized by denying Dolan's land use proposal. How then would such continuous and efficient public facilities materialize? They do not exist now, and the only way the city can obtain its bike path and greenway without paying for them is to condition any land use proposal that happens to occur on the land upon which the bike path and greenway are planned. See Dolan, 317 Or. at 123-24, 854 P.2d at 445-46 (Peterson, J., dissenting). The majority below does recognize that "[r]equiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," Dolan, 317 Or. at 118, 854 P.2d at 442, but that provides land owners little comfort when even the smallest and least intrusive land use proposals require governmental approvals and permits.

In support of its view that Nollan did not provide for a nexus that is based on more than just a mere minimal rational basis in these permit exaction cases, the Oregon Supreme Court cites to Park v. Watson, 716 F.2d 646, 653 (9th Cir. 1983). Dolan, 317 Or. at 118, 854 P.2d at 442. The court cites to Park v. Watson because this Court cited to Park v. Watson in Nollan, 483 U.S. at 839-40, as the first case in a long string citation of cases. The Court's string citation supported the Court's view that its holding (i.e., that the easement exacted from the Nollans was not connected to any of the California Coastal Commission's professed purposes) was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." Nollan, 483 U.S. at 839. But Park v. Watson and this Court's citation of it in Nollan does not stand for the proposition that Nollan requires only a minimal rational nexus. This Court's citation of Park v. Watson comes, of course, after the Court noted that "[w]e can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most

untailored standards." Nollan, 483 U.S. at 838. Thus, of course the holding in Nollan would be consistent with even those cases, such as Park v. Watson, employing a minimal rational relationship nexus test and a deferential standard of review to find the nexus involved there insufficient to support the permit condition.

Even more telling, the Oregon Supreme Court fails to note that the string citation in Nollan, 483 U.S. at 839-40, that begins with Park v. Watson, 716 F.2d 646, also contains citations to cases requiring a much greater nexus than one supported by a rational relationship. See e.g., Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). Moreover, the Oregon Supreme Court's reliance on Park v. Watson, 716 F.2d 646, is misplaced because while the Oregon court upheld the permit conditions imposed on Dolan, the Ninth Circuit held in Park v. Watson that the condition in question violated the just compensation clause.

We propose that when the government requires a property owner to dedicate land there must be a direct, substantial and essential connection to the relevant burdens imposed on the community by the owner's particular proposed land use. But even these adjectives leave too much to the great interpretive powers of government legislators and administrative officials who generally respond to the majority's wishes. This direct connection, therefore, should incorporate the essential elements of proportionality and specific (although perhaps not unique) attributability, and this nexus must be supported by at least substantial evidence on the record. Otherwise, the government exaction must be accompanied by just compensation. And if the government intends to provide no compensation, then the condition not meeting the constitutionally required nexus must be invalidated. See Hodel v. Irving, 481 U.S. 704 (1987).

The concept of proportionality was implicitly stated by this Court in Nollan, 483 U.S. at 835 n.4, but, for at least some land use regulators, implicit expressions of the limitations by

which they must govern are, apparently, not enough. Many other courts, pre and post Nollan, have incorporated notions of proportionality into their particular forms of rational relationship analysis. See e.g., Richardson v. City and County of Honolulu, 759 F.Supp. 1477, 1494-96 (D.Hawaii 1991); William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990); Cameron & Cameron, Inc. v. Planning Board of the Township of Warren, 593 A.2d 1250, 1254 (N.J. Super. Ct. App. Div. 1991); Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334, 336 (N.Y. Sup. Ct. 1990); Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370, 373 (Pa. Commw. Ct. 1989); Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 903-904 (Utah 1981); Unlimited v. Kitsap County, 750 P.2d 651, 653 (Wash. App. 1988); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965) (the first case to apply a rational relationship nexus test, specifically taking a step away from the strict "specific and unique" relationship test of Pioneer Trust & Savings Bank, 176 N.E.2d 799), appeal dismissed, 385 U.S. 4 (1966).

Thus, a rational relationship nexus that is grounded firmly on concepts of proportionality would require a government to determine a private landowner's pro rata (i.e., fair) share of the costs of public burdens based on that landowner's contribution in creating such public burdens. Given the serious damage that land use regulators have caused and can continue to cause to the constitutional rights of property owners, this is a minimal burden and, in fact, is already borne by many government agencies that respect and understand the importance of the rights of property owners. The Oregon Supreme Court's deferential review, allowing a completely untailored nexus to withstand constitutional scrutiny, is too important a federal issue to go uncorrected by this Court. This Court must make federal constitutional law fair and uniformly applicable to all citizens and reverse the decision below.

In reviewing the required nexus and to help justify its view that Nollan did not change the standard of inquiry in a "substantial advancement" takings case, the court below states that it is "not alone in interpreting Nollan in this manner." Dolan, 317 Or. at 119, 854 P.2d at 443 (citing to Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992). The Ninth Circuit stated that it is "not persuaded that Nollan materially changes the level of scrutiny" that must be applied to the ordinance at issue. Commercial Builders, 941 F.2d at 874. The Ninth Circuit also asserted that "Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Commercial Builders, 914 F.2d at 875 (emphasis added). In other words, according to the Ninth Circuit's reading of Nollan, only a scintilla of evidence is necessary to support a constitutional nexus. While we find the Ninth Circuit's reading of Nollan insupportable, the Oregon Supreme Court's reliance on it is even more remarkable because here there was not even a scintilla of evidence to support the city's generalized findings and assumptions about the impacts on the public caused by Dolan's proposed expansion of her business and the connection between public impacts and the permit conditions. Accord Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) (while following the extremely deferential standard of review used by the California courts, a school impact fee on commercial development was overturned because the school district did not provide any evidence to show that commercial development created the need for additional schools).

The Oregon Supreme Court decision is completely inapposite to other courts that have considered the meaning of Nollan. See, for example, Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989), cert. denied, 110 S. Ct. 500 (1989), in which the New York Court of Appeals stated that Nollan requires semi-strict or heightened scrutiny. Likewise, in Surfside Colony, Ltd. v. California Coastal Commission, 277

Cal. Rptr. 371, 377 (Ct. App. 1991) (footnotes omitted), the court held that "Nollan, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." See also Batch v. Town of Chapel Hill, 376 S.E.2d 22, 29, 34 (N.C. Ct. App. 1989) (Nollan established heightened judicial scrutiny and the nexus test of development exactions must contain the element of proportionality.), rev'd on other grounds, 387 S.E.2d 655 (N.C. 1990), cert. denied, 110 S. Ct. 2631 (1990).

Leading authors are in line with the view that Nollan changed the standard of review to heightened scrutiny, higher than the rational relationship review employed by the Oregon Supreme Court below. Berger, M., Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning, 20 Urb. Law. 735, 750-55 (1988); Best, The Supreme Court Becomes Serious About Takings Law: *Nollan* Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153, 156 (1987); Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L.J. 359, 380-81 (1988); Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Taking Problem, 62 U. Colo. L. Rev. 599, 613-14 (1991); Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335, 338 (1988); See also, Berger, L., Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186, 210 (1991) ("It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis . . ., that marks the importance of the Nollan case."); Daniel R. Mandelker, Land Use Law § 2.23 at 45 (2d ed. 1988) ("Nollan's most important holding is the heightened standard of judicial review it adopted."); Stroud, Legal Considerations of Development Impact Fees, 54 J. Am. Plan. A. 29 (1988) (Nollan "will require a strict accounting from local governments of how they use land development exactions"); Williams, Legal Discourse, Social Vision and The Supreme

Court's Land Use Planning Law: The Genealogy of the *Lochnerian* Recurrence in *First English Lutheran Church* and *Nollan*, 59 U. Colo. L. Rev. 427, 465 (1988) ("Nollan's significance is that for the first time in nearly sixty years, a Supreme Court land use decision has trumpeted property as a fundamental right, entitled to a heightened standard of judicial review under the Constitution.").

Thus, the opinion of the Oregon Supreme Court below is blatantly against the greater weight of authority. Not only has Florence Dolan been unjustifiably harmed by government's land use controls but the intolerable morass of governments and lower courts warping what the Court said in Nollan wastes precious resources by both land use proponents and their government regulators nationwide. Clear guidance, using terms familiar to land use exaction jurisprudence, such as proportionality and specific attributability, as well as heightened scrutiny for judicial review of the required nexus, are necessary to resolve these issues and the questions presented.

Finally, this Court warned that it would be particularly careful about the adjective "substantial" in the substantial advancement takings test where "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Nollan, 483 U.S. at 841. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting). Yet, while the Court would be particularly careful where the conveyance of property is involved, such language gives carte blanche to government regulators to impose, as permit conditions, all sorts of fees or other non-physical "exactions." Other courts also have interpreted Nollan so as to dwindle away the important constitutional limitation on government power at issue here. See, e.g., Blue Jean Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164,

165, 4 Cal. Rptr. 2d 114, 115 (1992) (Nollan's heightened scrutiny requirement applies to only possessory takings and not to regulatory takings), cert. denied, 113 S. Ct. 191 (1992). It is vitally important that the direct, essential nexus standard apply to all "exactions," including those that do not take the form of physical intrusions. Cf. Sterk, *Nollan*, Henry George, And Exactions, 88 Colum. L. Rev. 1731 n.3 (1988) ("[I]t requires but a small step to apply the Nollan strict scrutiny test when a municipality insists on payment of money for permission to develop rather than on dedication of some right to occupy land."). See also Batch, 376 S.E.2d at 30 (development exactions fall into one of four categories: 1) land dedication, 2) construction of improvements on such land, 3) fees paid in lieu of dedication, and 4) impact fees), rev'd on other grounds, 387 S.E.2d 655. In government's insatiable quest to find alternative sources of revenue, additional forms of "exactions" have also arisen, including "linkage fees" and "development excise taxes." See Connors and High, The Expanding Circle of Exactions: From Dedication To Linkage, 50 Law & Contemp. Probs. 69 (1987); Ethier & Weiss, Development Excise Taxes: An Exercise In Cleverness and Imagination, 42 Land Use L. & Zoning Dig., Feb. 1990, at 3.

Government's "impact fees" and other exactions that are outside the realm of land dedications, and which are used to fund all manner of public facilities, can be just as devastating to private property owners as physical land exactions. In all cases where the government imposes any type of exaction there is a heightened risk that the purpose of the exaction is avoidance of the bill to pay for the public amenities rather than the stated police-power objective. Cf. Nollan, 483 U.S. at 841. Thus, takings of private property, whether of land, currency or any other type, should be bound by the substantial nexus requirements outlined by this Court.

III. THE CITY'S ACTIONS IN THIS CASE DEMONSTRATE A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO ADMONISH GOVERNMENTS THAT DISREGARD AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS

It has been a long-standing governmental practice to demand land (e.g., land dedications) or money (e.g., impact fees and fees in lieu of dedications) from property owners who propose to build on their land. See, for example, Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Probs. 51 (1987), and authorities cited therein. But

> [t]he reach of subdivision exactions has significantly expanded over the years. What began as a means for preventing a subdivision from shifting to the municipality the responsibility for installing public improvements has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local governments can no longer afford.

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Probs. 5, 28 (1987). "[S]tate and local governments have begun to stretch the use of exactions to the breaking point." Commercial Builders of Northern California, 941 F. 2d at 877 (Beezer, J., dissenting). In a national symposium on development exactions, Professor Babcock, the late dean of the American land use bar, cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?
>
> The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.
>
> By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, Foreword to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Probs. 1, 2 (1987). See also Kelly, A Challenge To Planners: Solve the Takings Problem, 45 Land Use L. & Zoning Dig., Sept. 1993, at 3 ("[R]egulations are often adopted with surprisingly little planning and often with inadequate consideration of the impacts on private interests . . . ."); Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839, 841 (1983) ("[L]ocal governments cannot be trusted to deal fairly or carefully even in land decisions with only local consequences."); Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 Urb. Law. 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction."). Consequently, many of the demands and exactions imposed on individuals by local governments go unchallenged.

Local governments are well aware of the amount of time, money and other resources that are invested in a land use proposal even before the first application for approval is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. And when challenged, only occasionally will courts scrutinize the exercise of this municipal leverage in ringing terms. See e.g., Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (Land dedication "far out of proportion to the needs created by his subdivision . . . [amounts to] . . . grand theft."); J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (Land dedication and fee in lieu of dedication "appears to us to be an out-and-out plan of extortion."), overruled on other grounds, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); see also Nollan, 483 U.S. at 837 (easement condition amounts to extortion). As difficult as a takings challenge, indeed any litigation, is for the property owner, the just compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The Oregon Supreme Court's opinion below fatally damages this constitutional crutch.

These amici do not mean to suggest that all local governments -- counties, cities and towns -- are ruthless and unreasonable in conducting their daily land use decision making processes. Many, if not most, local governments are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while it is our view that too many communities do not respect constitutional considerations for the sake of political or financial expediency, if only one community forsakes one of its citizen's rights, the constitutional damage is done and we are all worse off because of it. And that damage is exponentially magnified by judicial acceptance of it. It is exactly because of these situations that constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct the constitutional damage and restore fairness and justice to land use regulatory systems.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972). We thought we obtained some relief with Nollan's dictates but decisions like those below point out, again, that important individual freedoms that run counter to the majority's wishes are the most evanescent of all. The types of unconstitutional permit conditions involved in this case cannot continue to crush forward. The role of the courts is to define when the government has gone too far and insure that adequate remedies exist to redress the individual's loss. The Oregon Supreme Court failed to exercise its duty of supervision in the conflict between the public's interest and the private property owner's rights.

While the takings clause in general does not act to prohibit transfers of wealth deemed appropriate by the majoritarian branches of government, courts ought to be suspicious of governmental actions that affect a narrow class of individuals as such actions can be taken without the usual political constraints. Justice Scalia recognized this danger in Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting). Thus, when wealth is exacted from a narrow class of individuals, as here, the takings clause should wield its power to limit governmental actions.

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just

> Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987). The context of the present case is a perfect vehicle within which the Court may elaborate on and reaffirm these just compensation clause principles, and the Court may do so without fear of unduly burdening land use regulatory agencies. The prohibition on constitutional shortcuts cannot be circumvented by regulators or the judiciary merely because the prohibition places the demanding task of responsible and accountable land use planning on the backs of government's land use agencies. After all, local governments are constrained by the just compensation requirement only to the extent that it means the land use business is to be conducted fairly, carefully, and with proper constitutional respect.

> Reasonable land use controls that are careful to take into account community responsibilities and individual rights are necessary for the wise growth of our vibrantly complex society . . . . Just as any successful business or institution must plan for the future, so, too, must government. Land use plans and zoning provisions that are fairly adopted, substantively sensible, consistently reliable and, when necessary, amendable, pose a major threat to none but those few on society's fringes who are greedy for unjust power or riches.
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> . . . .

> While it has long been recognized that mere planning, without more, cannot be a taking . . . concrete zoning or subdivision decisions that may or may not implement the plan are more than capable of becoming takings.
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> . . . .
>
> The problem with the municipal prerogative is not its existence but the temptation to make it, at times, an overbearing presence. Government must exercise authority, but tempered by meaningful accountability, both social and legal.

Bauman, The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls, 15 Rutgers L.J. 15, 85 - 86 (1983). These amici curiae ask this Court only that the City of Tigard be held meaningfully accountable, as constitutionally required, for its actions against Dolan.

CONCLUSION

For the reasons stated above and in the Brief of Petitioner, this Court is urged to reverse the Oregon Supreme Court and hold that the Constitution in land use exaction cases requires a strong nexus, one that is firmly grounded in the fair concept of proportionality, between the public burdens created by an individual and the permit conditions imposed on her. The Court is also urged to restate that heightened judicial scrutiny is to be applied to property owner challenges to government exactions of private property.

Respectfully Submitted,

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